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Albert J. Cope, Merlin B. Lybbert et al v. Bountiful Livestock Co. et al : Brief of Respondents

Utah Supreme Court

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In the
Supreme Court of the State of Utah

ALBERT J. COPE, Administrator de bonis non of the Estate of Francis Cope, Deceased,
Plaintiff and Appellant,
MERLIN R. LYBBERT, Administrator of the Estate of William P. Epperson, deceased; ALLAN SHOTT, JR., ELOISE B. SHOTT; and ADELPHINE COPE SUDBURRY,
Additional Plaintiffs and Appellants,
—vs.—
BOUNTIFUL LIVESTOCK COMPANY, DAVIS COUNTY, a municipal corporation, BRYANT JACOBS, Treasurer of Davis County, State of Utah, SALT LAKE PIPELINE COMPANY, a Nevada corporation, and SALT LAKE REFINING COMPANY, a Nevada corporation,
Defendants and Respondents.

Case No.
9531

BRIEF OF RESPONDENTS BOUNTIFUL LIVESTOCK COMPANY, SALT LAKE PIPELINE COMPANY, AND SALT LAKE REFINING COMPANY.

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STATEMENT OF FACTS

These respondents do not dispute those facts as between them and appellants as set forth in appellant's brief. Such statement is, however, insufficient to enable the Court properly to understand the nature of the entire

case and to make a proper disposition of the same. For this reason, the following statement is made.

The facts are not in dispute. Three cases are actually involved here. The essential facts are the same in each case and for brevity we will treat them as one. The plaintiffs are the successors in interest of prior owners of real property in Davis County, Utah. No taxes upon such premises have been paid by plaintiffs or their predecessors in interest since 1932 and for all practical purposes the property was abandoned by them. Auditor's deeds were issued to Davis County in 1937. Davis County desired to place the property on the tax rolls and in 1943 entered into a contract to sell the same. The contract was made with one David E. Howard on behalf of Bountiful Livestock Company. David E. Howard was originally joined herein as a party defendant but died during the pendency of the action. On October 18, 1944, the purchase price of the property was paid and the same was conveyed by Davis County to Bountiful Livestock Company. A portion of the property was, on February 11, 1956, sold and conveyed by the livestock company to Salt Lake Pipeline Company, which, in turn, on November 21, 1956, conveyed to Salt Lake Refining Company. Bountiful Livestock Company went into possession of the property in 1943 and has remained in possession and except as to the parcel sold to the pipeline company has continually used the premises for its livestock operations since that date. All taxes levied upon the premises have been paid by Bountiful Livestock Company and its successor in interest since 1944. (Deposition 1-21, R. 171-172.)

At the time of the sale to Bountiful Livestock Company in 1943, the Board of Commissioners of Davis County consisted of three members. One of the members was Amasa Howard. He was a brother of David Howard and was in 1943 a director and president of Bountiful Livestock Company and the owner of approximately twenty per cent of its stock. At the time of the offer of purchase in 1943, the County Commissioners inspected the property involved and thereafter by unanimous vote approved the sale to the livestock company. The sale was made at the fair value of the property. Amasa Howard was not chairman of the Board of County Commissioners. He did not move for the approval of the sale and has not profited from the transaction. (Deposition 1-21, R. 171-172.)

The complaints of the plaintiffs are unique. They are not in the form of actions to quiet title or for ejectment. The plaintiffs apparently recognized the controlling effect of certain statutes hereinafter considered and sought to avoid such statutes by attempting to ground their actions under the Declaratory Judgments Act. They do not allege a controversy or any justiciable issue usually deemed necessary to found an action under such act. They affirmatively allege that the livestock company took possession of the property at the time of sale, and has ever since the sale, had the use, benefit and occupation of the premises. As we understand, the contentions of the plaintiffs, they proceed upon the theory that the tax sale proceedings under which Davis County acquired its tax title were a nullity; that the deed from Davis County to the livestock company was likewise a

nullity; that the plaintiffs are entitled to the value of the use and occupation of the premises from the livestock company and that their only obligation may be to pay some taxes to Davis County. It is suggested that the actions are in the nature of equitable suits to redeem the premises, but the allegations of the complaints are not framed in the language usually employed in suits in equity. Whatever the nature of the actions may be construed to be, these plaintiffs cannot avoid the controlling effect of the statutes and principles of law here considered and this case must be determined by the application of such statutes and principles. (R. 1-5, 24-25, 41, 46-48.)

The position of these defendants in this rather complicated case has been that: (i) The deed from Davis County to the livestock company is valid. (ii) If there be any invalidity in the deed the same is voidable and not void. (iii) If any claim exists to set the deed aside such claim is held by Davis County and not by these plaintiffs. (iv) Because of the controlling effect of our statutes of limitations and adverse possession, plaintiffs have no right in any event to recover. The defendants, Salt Lake Pipeline Company, and Salt Lake Refining Company, also assert that they are innocent purchasers for value without notice of any defect in the Davis County deed. However this defense will not be reached in the disposition of plaintiffs' claims. The defendant, Davis County, admits the facts herein set forth, but as against the claim of plaintiffs pleads in bar the statutes herein considered. (Transcript 1-21.)

The issues involved here as between the plaintiffs and the defendants were first fully explored by the trial court on plaintiffs' motion for summary judgment. (R. 74-75) Briefs were submitted on the issues involved under such motion. (R. 125-144) Plaintiffs' briefs are made a part of the record, but the briefs of defendants are for some reason omitted. Nevertheless, the trial court considered all the issues and denied plaintiffs' motion for summary judgment. (R. 149) The matter then came on for hearing on pretrial. These defendants would have preferred to have considered the issues in the order indicated above, however the trial court preferred to pass directly to the question of whether the deed was voidable or void. (Transcript 1-21) The defendants did not, of course, in submitting such issue, concede that the deed was in any manner invalid. The trial court upon consideration of the matter determined that the plaintiffs had no basis for recovery in any event and entered the judgment of dismissal from which this appeal is taken. (R. 170-175)

By cross complaint Davis County asserts against its co-defendants the invalidity of the deed to the livestock company. These defendants, as against such cross complaint, assert the validity of the deed, statutes of limitations, and of adverse possession, estoppel, and as to the pipeline company and its grantee the further defense that they were innocent purchasers for value without notices of any claims of Davis County. (R. 12-15, 18-21, 27-34, 89-98)

Appellants seems to contend that the trial court held that Davis County had the right to set aside the deed to the livestock company. The record is clearly to the contrary. The only issues determined were under the complaint. No issues have been framed by the Court under the cross complaint, and the trial court very carefully reserved all issues as between Davis County and its co-defendants. Upon the trial of that phase of the case, these defendants will assert every defense available to them under the facts and the issues there presented. (R. 170-177)

We are convinced that the judgment of the trial court is necessarily compelled by the facts in this case and fully disposes of the entire case as between the plaintiffs and the defendants. While the issue for immediate consideration before the court on pretrial was whether at the suit of plaintiffs the deed to the livestock company was voidable or void, the judgment of the court, being for dismissal of the action necessarily encompasses any question as to the right of the plaintiffs to recover. The findings of the trial court are sufficient to support a complete disposition of this case, (R. 170-175) and inasmuch as there are no issues of fact which would be material to such a determination, we think it is essential that all of the questions which might in any event arise in this case be explored and the entire matter be presented to this Court in order that as between the plaintiffs and all defendants this matter may be laid at rest. For this reason, we have undertaken in this brief to express our views on each issue which may be necessary fully to dispose of plaintiffs' claim.

STATEMENT OF POINTS

POINT I.

AT THE SUIT OF PLAINTIFFS THE DEED FROM DAVIS COUNTY TO BOUNTIFUL LIVESTOCK COMPANY IS VALID.

(a) The Penalty of the Statute Involved Falls upon the Individual, not upon the Deed.

(b) The Vote of Amasa Howard Was Not Necessary to Authorize the Sale to Bountiful Livestock Company.

POINT II.

IF THE DEED FROM DAVIS COUNTY TO BOUNTIFUL LIVESTOCK COMPANY BE IN ANY MANNER INVALID, IT IS AT MOST VOIDABLE AND NOT VOID.

POINT III.

IF THE DEED FROM DAVIS COUNTY TO BOUNTIFUL LIVESTOCK COMPANY IS VOIDABLE, PLAINTIFFS HAVE NO CAUSE OF ACTION TO SET THE DEED ASIDE.

POINT IV.

IN NO EVENT MAY THE PLAINTIFFS RECOVER IN THIS CASE.

(a) Plaintiffs Can Succeed Only on the Strength of Their Own Title.

(b) Whether the Deed from Davis County to Bountiful Livestock Company is Void or Voidable, Plaintiffs are now Barred from Instituting this Action by Reason of the

Provisions of the Special Statutes of Limitation Relating to Tax Titles.

(c) In Any Event, the Deed from Davis County to Bountiful Livestock Company is a Written Instrument upon which Bountiful Livestock Company and its Successors can found a Defense based upon Adverse Possession.

(d) Plaintiffs are now Barred by the General Adverse Possession Statutes.

(e) The Bar which Prevents Plaintiffs from Recovery against Bountiful Livestock Company, Salt Lake Pipeline Company and Salt Lake Refining Company Likewise Bars the Plaintiffs from any Recovery against Davis County.

ARGUMENT

POINT I.

AT THE SUIT OF PLAINTIFFS THE DEED FROM DAVIS COUNTY TO BOUNTIFUL LIVESTOCK COMPANY IS VALID.

The deed from Davis County to Bountiful Livestock Company is valid for two reasons:

(a) The Penalty of the Statute Involved Falls upon the Individual, not upon the Deed.

(b) The Vote of Amasa Howard Was Not Necessary to Authorize the Sale to Bountiful Livestock Company.

Statutes which deal with the subject of the interest of a public officer in transactions with the public body are of two kinds, namely, (i) those which impose a penal-

ty upon the officer for violation of the statute, and (ii) those which invalidate the transaction.

Section 17-5-10, Utah Code Annotated, 1953, prohibits a board member from being interested in transactions with his county. Penalties are imposed for violation of this section under other statutory provisions, including those providing for removal from office. Thus the offending officer may be subjected to punishment. The statute does not, however, render invalid the transaction.

The statute here involved relating to county officers should be compared with Section 10-6-38, Utah Code Annotated, 1953, relating to city officers, which contains the prohibitive provisions and also provides that any prohibited contract shall be void.

Section 17-5-10 was construed by this Court in *Engle* v. *District Court of Carbon County,* 96 Utah 245, 85 P.2d 627, where accusation proceedings taken against the County Commissioner Engle for violation of said section were sustained. The decision in that case demonstrates the operation of the statute. If the County Commissioner Amasa Howard in voting for the sale of the premises to Bountiful Livestock Company violated the provisions of said section, then Howard may have been guilty of an offense for which appropriate proceedings could have been taken against him. This remedy against the individual, however, is wholly separate and distinct from the transaction itself, and the personal liability of the officer does not destroy the validity of the deed to Bountiful Livestock Company.

This principle is demonstrated in the case of *Marshall* v. *Elmwood City Borough* (Pa.) 41 Atl. 994. In that case Marshall brought an action against the City to restrain it from paying out money under a contract with Elmwood Water Company. The fact was that one of the members of the Borough Council, at the time of the enactment of an ordinance for a contract with the Water Company, was disqualified from voting because he was then secretary of the Water Company. The statute involved prescribed penal consequences in such a situation. The court pointed out, however, that those consequences were personal to the offender and did not in terms extend to or embrace the legal effect of the municipal contract in which he participated. In sustaining the contract, the court at page 995 of the Atlantic Reporter employs the following language:

> "The contract inherently was a perfectly legitimate contract, which the parties were at liberty to make. Hence the authorities cited for the appellant in which contracts made by a municipality with a prohibited person, such as a member of councils or a member of a purchasing committee, or by a county board of commissioners with one of its own body, are held to be invalid, have no application. * * * The Penal Code of 1860 prohibited a member of a municipality from being interested in a contract for furnishing supplies or materials to the corporation, and imposed personal penalties upon him if he violated the act, and to these penalties he is, of course, liable. But the invalidity of such a contract is not declared as a penal consequence, or as any consequence of such a situation."

In *Grady* v. *City of Livingston,* (Mont.) 141 P. 2d 346, actions were brought by tax paying plaintiffs to recover on behalf of the City of Livingston money paid by the City to various corporate defendants. The money sought to be recovered was for merchandise sold and delivered to the City by the defendants. At the time the goods were bought by the City, certain members of the City Council were employees or officials of the defendant corporations. The trial court refused recovery and the Supreme Court in a divided opinion affirmed. The Montana statute was much like ours except that it contained provisions that contracts made in violation of the statute could be avoided at the instance of any party except the officers interested therein. The following language employed in the opinion of Mr. Justice Morris, appearing at page 352 of the Pacific Reporter is material here:

> ". . . We do not think there is any rule of equity that empowers any court to penalize a corporation on the ground that one of its agents, while serving a municipality, violated his trust as an officer of the municipality. The respective obligations of the official to his employer on the one hand and to the municipality on the other are separate and distinct. There is no relation whatever between the two. The employer is no more blamable for the action of the employee public official than the city. The remedy for violation of either does not depend in the slightest degree upon the other. The code sections mentioned and section 10827 were obviously intended to punish and to purge the public service of persons who betray the public trust reposed in them, not to confiscate the property of business concerns,

> whose employees they happen to be. There is another, and a distinct remedy for the latter."

The vote of Amasa Howard was not necessary to the sale. The vote of other Commissioners was sufficient. The transaction may therefore be sustained. See *Marshall* v. *Elwood City Borough, supra,* where the court at page 995 of the Atlantic Reporter observed as follows:

> "The council consisted of six members, of whom five were present when the ordinance in question was proposed. The whole five voted in favor of the ordinance, one of them being Mr. Roelofs. Four votes were a clear majority of the whole number of councilmen. None of these four members was disqualified, and the ordinance was passed by a majority of the whole number of members without any regard being had to the vote of Mr. Roelofs. His vote, therefore, had no legal efficacy in the passage of the ordinance. It was passed by the qualified vote of the other four members. Does an ordinance which has enough legal votes to sustain it become illegal because there were other persons — one or more — voting in its favor who were not qualified to vote? It would be an astonishing proposition to submit that an ordinance in a body of fifty or a hundred members, which was passed by a considerable majority of perfectly qualified votes, should be declared illegal because it had received the supporting vote of one member who was disqualified. We have not been referred to any decision of any court holding such a doctrine, and we cannot imagine that any such decision can be found. We know of no reason, in the present case, why the invalid vote of one member of the council should be held to invalidate the perfectly legal vote of the other four members."

Counsel for appellants cite and rely on *City of San Diego* v. *San Diego & Los Angeles Railroad Company*, (Cal.) 44 Cal. 106. In that case, however, it appears that two of the three members of the Board of Trustees of the City voted in favor of making a grant of land to the Railroad Company and the third member of the board voted against such transfer. One of the two board members voting in favor of the transfer was a stockholder and director of the Railroad Company. The court said:

> "We do not doubt that a majority of the trustees might execute the power but the question is, whether Sherman, who was a stockholder and director of the Railroad Company, could be one of that majority."

Upon the grounds hereinabove set forth we submit the deed to the Livestock Company is valid.

POINT II.

IF THE DEED FROM DAVIS COUNTY TO BOUNTIFUL LIVESTOCK COMPANY BE IN ANY MANNER INVALID, IT IS AT MOST VOIDABLE AND NOT VOID.

Before proceeding with a consideration of the cases in support of the proposition stated above, it is well to observe again the background of the transaction under attack. The record indicates that the parties proceeded in good faith to enter into the contract in 1943 and to execute the deed in 1944. The price paid represented the fair value of the property. Davis County executed and delivered the deed and received the consideration therefor, and has for some sixteen years collected and received

taxes from the grantee or its successors. (Deposition 1-21) It was to the benefit and advantage of Davis County to restore the property to the tax rolls and there is no doubt that the County had the power to sell the property as it did. It had the power to vest title in the purchaser and the grantee corporation had the power to take and receive title to real property. The only impairment in the entire transaction lies in the fact that Amasa Howard, one of the Commissioners of Davis County, was an officer and director of the livestock company. Under the circumstances, in view of the long lapse of time and benefits which have accrued to Davis County, it would require the most impelling reasons to invoke the harsh and punitive rule that the deed to the livestock company was a complete and utter nullity and that no title whatever passed to the purchaser Bountiful Livestock Company.

There is no hard and fast rule as to whether a deed may be voidable or void. The answer depends not only upon all the facts and circumstances involved in a case, the statutes under which the problem arises, but also upon the parties who assert the contention. Thus it may very well be that as to some persons and under some circumstances the deed may be valid, but as to other persons and under other circumstances the deed may be voidable or void. This is particularly true in a situation such as that presented here, where the plaintiffs seek to set aside a deed not on behalf of the County, who was a party to the transaction, but against the County and adverse to it, in the vary same action in which the County itself seeks to set aside the deed upon the basis of its own independent claim. Moreover, there is the utmost con-

fusion in the decisions in the use of the terms "void" and "voidable." In a strictest sense a void instrument is a nullity, while a voidable instrument is one which is valid until set aside by one having a right to do so. It is seldom that an instrument is a complete nullity as to all persons and under all circumstances. In most situations where the courts use the term "void" they actually mean voidable at the suit of a party having a right to set the instrument aside.

These principles have been announced in a great many cases. We think there is no benefit to the Court in extensive citations of such cases. The most careful statement of the law which we have found is that set forth in *State* v. *Richmond* (New Hampshire) 26 N.H. (6 Fost.) 232-237, as follows:

> "There is in our books great looseness and no little confusion in the use of the terms 'void' and 'voidable,' growing, perhaps, in some degree out of the imperfection of our language. There are at least four kinds of defects which are included under these expressions, while we have but those two terms to express them all. 2 Kent, Comm. 234; 7 Bac. Abr. 64, 'Void and Voidable'; 22 Vin. Abr. 12, 'Void and Voidable'; Jac. Law Dict. 'Void.' (1) Proceedings may be wholly void, without force or effect as to all persons and for all purposes, and incapable of being or being made otherwise. This is the broadest sense of the word, but the cases which fall within this signification are probably not numerous. (2) Things may be void as to some persons and for some purposes, and as to them incapable of being otherwise, which are yet valid as to other persons and effectual for other purposes; as a deed executed by an idiot,

and by others capable of contracting, may be void as to the idiot, and yet binding as to the others. An instrument in form of a deed, but without a seal, may be void as a conveyance, and yet be binding for some other purposes. (3) Things may be void as to all persons and for all purposes, or as to some persons and for some purposes, though not so as to others, until they are confirmed; but, though said to be void, they are not so in the broadest sense of that term, because they have a capacity of being confirmed, and after such confirmation they are binding. For this kind of defect our language affords no distinctive term. They are strictly neither void—that is, mere nullities—nor voidable, because they do not require to be avoided, but until confirmed they are without validity. They are usually spoken of as void; and, as usage is the only law of language, they are so called correctly. It is, therefore, always to be considered an open question, to be decided by the connection and otherwise, whether the term 'void' is used in a given instance in one or the other of these in some respects dissimilar senses. (4) Contracts and proceedings are properly called voidable which are valid and effectual until they are avoided by some act. Prima facie they are valid, but they are subject to defects, of which some person has a right to take advantage, who may by proper proceedings for that purpose entirely defeat and destroy them. Voidable contracts are in general, perhaps always, like the last class referred to, capable of confirmation by the party who has the right to avoid them. 1 Bouv. Inst. S 1321. Matters which are properly voidable are very commonly spoken of as void. Smith v. Saxton, 23 Mass. (6 Pick.) 483, 487. Technically and legally speaking, they are improperly so called. But the word 'void' is so often used by good writers, and even by legal writers, in the

> sense of invalid, ineffectual, or not binding, that it can hardly be said that this is not a correct and legitimate use of the term. Our books are full of examples of the loose and inaccurate use of these words, and many difficult questions have grown out of this circumstance. They are so common that we think no strong inference can be justly drawn from the unqualified use of these words as to the particular kind or degree of invalidity meant, where the attention of the court is not clearly directed to that point."

The principles stated above are summarized by the Supreme Court of the United States and other authorities as follows:

> "It is rarely that things are wholly 'void' and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. Things are 'voidable' which are valid and effectual until they are avoided by some act; while things are often said to be 'void' which are without validity until confirmed. Toy Toy v. Hopkins, 29 S. Ct. 416, 417, 212 U.S. 542, 53 L. Ed. 644, citing 8 Bac. Abr.: Ewell v. Daggs, 2 S. Ct. 408, 108 U.S. 143, 27 L. Ed. 682; Weeks v. Bridgman, 16 S. Ct. 72, 74, 159 U.S. 541, 40 L. Ed. 253, 255; Louisville Trust Co. v. Comingor, 22 S. Ct. 293, 296, 184 U.S. 18, 25, 46 L. Ed. 413, 416."

It is in the light of these principles and the facts involved that the question must be considered.

The situation presented here is quite analogous to that involving an executed contract. Many cases of such character have been presented to the courts and the rules frequently announced to the effect that where the contract has been executed and the municipality has received

all of the benefits thereunder, the person who has conferred those benefits while he may be unable to sue directly upon the contract, may nevertheless recover in equity the reasonable value of the benefit conferred upon the municipality. Such a result could be reached upon the theory that the contract is voidable only and not completely void.

In *Town of Hartley* v. *Floete Lumber Co.*, (Iowa), 171 N.W. 183, a stockholder director and manager of a corporation and who was also a member of the City Council voted to purchase merchandise from the corporation. The merchandise was duly purchased and used by the municipality and warrants issued in payment of the materials furnished. After the City had received the materials and used them, a suit was brought by the Town Council to cancel the warrants in the hands of the Company. The defendant Company in a cross-petition sought to recover the fair value of the goods sold. This, then, presented a situation where recovery was not sought on the contract itself but for the fair value of the goods sold. The court had occasion to review the general law on the subject of the enforcement of such contracts, announcing the principles which we have considered here, and then made the following observations:

> "The thought running through the cases seems to be that one entrusted with the business of others cannot be allowed to make such business an object of pecuniary profit to himself. Nothing can be added to what has been already said by this Court on this question. Such contracts are voidable at common law. This Court has refused to recognize them or enforce them. * * * But the

> question still remains: Is this defendant company without remedy in a court of equity. The contract, it is true, was made in violation of public policy, and the contract, as such, was not enforceable in law or equity, and, while executory, any attempt to enforce it would have been enjoined. It was a voidable contract, and, upon proper showing, the courts refused to recognize and enforce it. We have, however, this situation before us: The plaintiff city acted through its counsel — a body of men of its own choosing. The things involved in this suit were needed by the city. The city had a right to, and because of its needs it was its duty, to purchase these things somewhere. The purchase was neither against the statute nor contrary to public policy. The purchase was not wrongful in itself. It only became unenforceable because of the relationship of the parties to the transaction."

In *Mares* v. *Janutka,* (Minn.) 264 N.W. 222, residents and taxpayers of the City of Montgomery sued to compel the defendant to restore to the City Treasury certain money received by him for the sale of merchandise and material to the City during the time he was a member of the City Council. There appeared to be no doubt that the defendant as a member of the City Council, made sales to the City for merchandise at a fair price. The City used the merchandise, obtained the benefit of, and paid for the same. The plaintiffs, being taxpayers, brought to suit to compel the defendant to pay back the money. The court refused to permit the recovery and stated the rule as follows:

> "When such officer sells to his municipality property within its municipal powers to acquire

> and use, and it is so acquired and used, liability may be enforced *quasi ex contractu*, but in no event beyond the value of the property to the municipality."

The contract between the City and the officer was voidable but not void. Had it been utterly void a court of equity would not have permitted retention of the selling price of the property.

In *Trainer* v. *Wolfe,* (Pa.), 21 Atl. 391, a school board purchased a school site of land which was owned by one of its members. The school district paid out the money and received the title to the property. Thereafter suit was brought by certain taxpayers to set the transaction aside. The court in sustaining the transaction said in part:

> "We have, then, the case of a sale of real estate where the same person is both vendor and vendee. The law under said circumstances is well settled. The sale is not void; it is merely voidable."

See also *Grady* v. *City of Livingston,* (Mont.) *supra.*

Consideration will now be given to the cases cited by appellants. *Hardy v. Mayor of City of Gainesville* (Ga.) 48 S.E. 921, is an action brought by a citizen against the City to enjoin it from performing a certain contract. This is typical of a number of cases which will be found in the books where a citizen on behalf of a municipality and acting for it seeks to enjoin the performance of an executory contract entered into in violation of some statutory provisions. Cases of this character

are clearly not within the facts or principles involved here. We are not dealing with an executory contract but a transaction fully performed on both sides and which has been acted upon by the parties for many years. Moreover, the plaintiffs are not seeking to protect any right or interest of Davis County but are, as we have shown, proceeding against Davis County, seeking to recover the property adverse to it.

In *Githens* v. *Butler County* (Mo.) 165 S.W. 2d 650, the wife of a county judge purchased certain county property and thereafter brought suit against the county to quiet the title to the same. The county counterclaimed, seeking to set aside the deed and tendered into court the amount of money paid by the plaintiff in the purchase of the property. The court held that because of the relationship of husband and wife under Missouri law, the judge had an indirect interest in the property so purchased by his wife of such character that the deed could be set aside. In this case, the county felt compelled and the court agreed that the county was obligated to pay back to the plaintiff the purchase price of the property. This could only be on the theory that the purchase was voidable. Had the purchase been a nullity, the county would not have been obligated to pay back the purchase price. There is certainly nothing in this case which aids the plaintiffs in their suit for the reason, as we have pointed out at the outset, they are proceeding not for the benefit of the County, but adversely to it.

Baker v. *Scofield*, 243 U.S. 114, does not seem to be in point. In that case suit was brought by a receiver

of a bank to recover back property which had been transferred to a corporation controlled by a prior receiver and purchased with funds of the bank. The court properly held that the property should be recovered back. This would appear to be entirely consistent with the theory that the deed was voidable and consistent moreover with the proposition that the cause of action to recover the property back belonged to the receiver of the bank. By analogy it would appear clear that if there is any cause of action here to recover the property from Bountiful Livestock Company or its successors, such cause of action belongs to Davis County, the party who conveyed to Bountiful Livestock Company, and not by the plaintiffs here who are actually strangers seeking to gain a windfall against Davis County.

Hennessy v. *Automobile Owners Insurance Association* (Tex.), 282 S.W. 791, is directly contrary to the contentions of appellants. There the plaintiff purchased a second-hand automobile without demanding and receiving the license fee, receipt, or bill of sale required by Texas law. Thereafter, he sold the car to another, retaining a mortgage to secure payment of the amount owing to him. The plaintiff likewise failed to transfer and deliver to the purchaser the license fee receipt or bill of sale at the time he sold the car. Plaintiff obtained an insurance policy on the car to protect his interest therein by reason of the mortgage. The car was stolen and destroyed and plaintiff sought to recover. The two lower courts held he was not entitled to do so, but the Supreme Court held that the plaintiff was entitled to recover, saying in part:

> "We cannot agree with the holding that the plaintiff in error, Hennessy, got no title to the automobile when he purchased it in violation of the requirements of the act, and that title did not pass to Chisholm on the sale to him. Hennessy had an insurable interest in the property insured, and we recommend that the judgments of both the courts be reversed, and the cause remanded to the district court."

In *Stockton Morris Land Co.* v. *California Tractor & Equipment Corp.*, (Cal.) 247 P. 2d 90, a tractor company and a finance company jointly made arrangements whereby the tractor company sold certain equipment to a county and thereafter assigned the contract to the finance company. The contract with the county was not executed as required by law, and consequently the finance company could not recover against the county, but brought suit against the tractor company under the warranties of its assignment. The court held that the finance company could not recover against the tractor company for the simple reason that the finance company had in effect joined with the tractor company in selling the property to the county. This again is a situation where a court denied enforcement of an invalid executory contract. The books are full of such cases but as we have pointed out they have no application here.

The *City of San Diego* v. *San Diego & Los Angeles Railroad Company, supra*, is actually an authority in favor of respondents because the language of the court clearly indicates that a transaction authorized by two qualified members of a municipal body may be valid even though the third member was disqualified, providing

the two qualified members vote in favor of the transaction.

Tuscan, et al v. *Smith, et al.,* (Me.) 153 Atl. 289, presents a situation in which certain inhabitants of a town brought suit against certain individuals for the cancellation of a lease. This again is a case in which suit is brought on behalf of a town to terminate an executory contract.

In *Miller* v. *McKinnon,* (Cal.) 124 P. 2d 34, suit was brought by a taxpayer on behalf of Santa Clara County against the partnership and the members thereof and certain county officers to recover money claimed to have been illegally expended by the county and received by the partnership. The contention was that the county failed to procure bids for the work as required by statute. The case went up on appeal from an order sustaining a demurrer to the complaint. The court held that the complaint stated a cause of action. Again, this is a typical situation in a proceeding directly between the county and persons dealing with it. It does not touch a situation as presented here, where the plaintiff seeks to proceed adversely against a county in a suit in which the county itself seeks to set aside a deed.

Appellants quote from 14 Am. Jur., Counties, Section 42, Page 211. The case cited in support of the text is *Cheney* v. *Unroe* (Ind.) 77 N.E. 1041. In that case plaintiff was appointed by the county to superintend some highway construction on its behalf. He was paid for this work by the county. In addition to such service for the

county, he entered into the employment of the contractor on the job at a stipulated sum per day. He sued the contractor for his compensation. He thus sought to be paid from both sides on the contract. The court held that he was not entitled to recover and properly so.

Appellants also quote from 20 C.J.S., Counties, Section 192, Page 1028. The case in support of the text there is *Logan County* v. *Edwards* (Ky.) 266 S.W. 917. In that case the county brought suit against Edwards to recover certain moneys paid to Edwards upon claims which were approved against the county. It appears that Edwards was former county judge and a member of a fiscal court which voted for the allowance of the claims. The claims were in favor of Edwards and a drygoods company, of which he was the principal owner. The court held that under the Kentucky statute, the allowance of the claims were invalid. The case arose on demurrer and the court held that the complaint stated a cause of action against Edwards. This again is a direct action by the county against the former judge.

This leaves for consideration only the case of *Clark* v. *Utah Construction Co.* (Idaho) 8 P. 2d 454. In that case it appears that Clark as a member of the Board of County Commissioners of Ada County, Idaho, executed a deed to certain tax property to his wife, Dora A. Clark. Because of the community property laws in effect in Idaho, the court reached the conclusion that the deed from Clark to his wife was in effect a conveyance to him of property and void under Idaho law. The action in question, however, arose under unusual circumstances.

Utah Construction Company had been grazing sheep on the land in question. Clark as assignee of his wife, brought suit against the Construction Company to recover damages for trespass. In order to sustain his right to recovery, Clark introduced the deed from himself to his wife and an assignment from her to him of his claim to recover for the trespass. The validity of the deed to Clark's wife was raised as a defense by the Construction Company. The Idaho statute made the violation of its provisions a felony and further provided that:

> "Every contract made in violation of any of the provisions of the two preceding sections may be avoided at the instance of any party except the officer interested therein."

Under these statutory provisions the court held that the defendant Construction Company was entitled to assert the invalidity of the deed to Clark's wife. The Court held that the plaintiff could not recover against the Construction Company for the alleged trespass and simply left the parties where it found them. While the court uses broad language respecting the invalidity of the deed, there is actually nothing in the case which assists the plaintiffs in their claim here. Neither the facts or the statutes involved in the Clark case are presented here. Moreover, it must be manifest that the plaintiffs cannot, for their own personal benefit, attack the deed adversely to Davis County in the very same suit in which Davis County is itself for the public benefit undertaking to assert the invalidity of the deed.

POINT III.

IF THE DEED FROM DAVIS COUNTY TO BOUNTIFUL LIVESTOCK COMPANY IS VOIDABLE, PLAINTIFFS HAVE NO CAUSE OF ACTION TO SET THE DEED ASIDE.

We have seen that whether a deed is voidable or void depends upon the facts and circumstances of each case. One of the determinative facts is who asserts such invalidity. The problem here is not whether, as an abstract question, the deed from Davis County to Bountiful Livestock Company is invalid. The question is whether the deed is invalid *at the suit of the plaintiffs*. That is a totally different question from whether the deed may be set aside at the suit of Davis County. These defendants do not concede that Davis County has any rights to set the deed aside, and the trial court has expressly reserved that question. Whatever result might ultimately be reached in the trial of the issues under the cross complaint we submit that under the alignment of the parties and the issues in this case the plaintiffs have no standing to assert such invalidity.

We are sure that counsel for appellants have made diligent search to find some authority where, under an alignment of parties and with issues such as are presented here, a court has held that parties in the position of these plaintiffs might assert against the county itself the invalidity of a deed such as that delivered to the livestock company. From the foregoing analysis it is seen that none of the authorities cited by appellant support such a contention. We have found no such case and we are sure

that no court of last resort has ever so held. All of the cases which we have found fall into either one class or another, namely, (i) cases in which a taxpayer is himself on behalf of the governmental body, seeking, to prevent or set aside some transaction, or (ii) cases in which the governmental body itself has sought to assert some right. No case has been found where a person in the position of these plaintiffs has been able to assert such a claim adversely to the governmental body.

POINT IV.

IN NO EVENT MAY THE PLAINTIFFS RECOVER IN THIS CASE.

(a) Plaintiffs Can Succeed Only on the Strength of Their Own Title.

Whether these proceedings are viewed as an action to quiet title or an equitable suit to redeem, or however viewed, the plaintiffs are in effect seeking to establish and quiet their title against the claims of all the defendants including Davis County. It is therefore necessary to consider the nature of the burden which rests upon the plaintiffs and the proof which must be made with respect to the title which they claim to the property in question.

The rule has been announced in a host of cases and now constitutes a well established principle which has acquired the force of a maxim, that in suits to determine adverse claims to property a plaintiff can recover only on the strength of his own title and not on the weakness of the title of his adversary. This proposition has been often recognized by this Court. See *Cottrell v. Pickering*,

32 Utah 62, 88 Pac. 696; *Babcock v. Dangerfield,* 98 Utah 10, 94 P.2d 862; *Mercur Coalition Mining Co. v. Cannon, et al.,* 112 Utah 13, 184 P. 2d 341 and *Lyman v. National Mortgage Bond Corporation,* 7 Utah 2d 123, 320 P. 2d 322, where at page 127 of the Utah Report, the rule is stated to be that:

> ". . . Plaintiffs must succeed on the strength of their own claim and not alone on the weakness of the defendant's claim in order to succeed . . ."

The foregoing rule is particularly important in the disposition of the issues involved here as we shall hereafter demonstrate.

(b) Whether the Deed from Davis County to Bountiful Livestock Company is Void or Voidable, Plaintiffs are now Barred from Instituting this Action by Reason of the Provisions of the Special Statutes of Limitation Relating to Tax Titles.

In 1951, the Legislature, by Chapter 19, Laws of 1951, enacted five sections, being designated as 78-12-5.1, 78-12-5.2, 78-12-5.3, 78-12-7.1 and 78-12-12.1 1961 Pocket Supplement to Volume 9, Utah Code Annotated, 1953. The first case under the 1951 statute was *Hansen* v. *Morris,* 3 Utah 2d 311, 283 P. 2d 884, in which this Court held the Act to be constitutional and sustained a tax title. The next case was *Peterson* v. *Callister,* 6 Utah 2d 359, 313 P. 2d 814. In the second case, suit was brought by a tax title holder to quiet the title. Although it appeared that the auditor's deed to the county

and the deed out from the county were defective, the court sustained the tax title.

The next case which came before this Court was *Lyman* v. *National Mortgage Bond Corporation, supra.* In both *Hansen* v. *Morris,* and *Peterson* v. *Callister, supra,* the plaintiff was the tax title holder seeking to quiet his title against the old owner. This was likewise the situation in *Lyman v. National Mortgage Bond Corporation.* In the present cases, the situation is reversed. The old owner is seeking to recover title against the County and its grantee.

While, as pointed out herein, we have no quarrel with the decisions in the foregoing three cases, the alignment of the parties makes a fundamental difference in the cases in view of the foregoing rule that the plaintiffs must rely upon the strength of their own title and not upon the weakness of the title of the defendants.

Before considering these three cases further, it is necessary to observe the scope of the five sections embodied in the 1951 Act. These sections covered three subjects, namely, (i) limitations of actions, (ii) adverse possession, and (iii) definition of terms. The two sections dealing with limitations of actions are designated in said Pocket Part to said Volume 9, as Sections 78-12-5.1 and 78-12-5.2 and provide as follows:

> "78-12-5.1. Seizure or possession within seven years - Proviso - Tax title. - No action for the recovery of real property or for the possession thereof shall be maintained, unless the plaintiff or his predecessor was seized or possessed of such

property within seven years from the commencement of such action; provided, however, that with respect to actions or defenses brought or interposed for the recovery or possession of or to quiet title or determine the ownership of real property against the holder of a tax title to such property, no such action or defense shall be commenced or interposed more than four years after the date of the tax deed, conveyance, or transfer creating such tax title unless the person commencing or interposing such action or defense or his predecessor has actually occupied or been in possession of such property within four years prior to the commencement or interposition of such action or defense or within one year from the effective date of this amendment."

"78-12-5.2. Holder of tax title — Limitations of action or defense - Proviso. - No action or defense for the recovery or possession of real property or to quiet title or determine the ownership thereof shall be commenced or interposed against the holder of a tax title after the expiration of four years from the date of the sale conveyance or transfer of such tax title to any county, or directly to any other purchase thereof at any public or private tax sale and after the expiration of one year from the date of this act. Provided, however, that this section shall not bar any action or defense by the owner of the legal title to such property where he or his predecessor has actually occupied or been in actual possession of such property within four years from the commencement or interposition of such action or defense. And provided further, that this section shall not bar any defense by a city or town, to an action by the holder of a tax title, to the effect that such city or town holds a lien against such property which is equal or superior to the claim of the holder of such tax title."

The two sections dealing with acquisition of title by adverse possession are designated in said Pocket Part as Sections 78-12-7.1 and 78-12-12.1 and provide as follows:

> "78-12-7.1 Adverse possession - Presumption - Proviso - Tax title. - In every action for the recovery or possession of real property or to quiet title to or determine the owner thereof the person establishing a legal title to such property shall be presumed to have been possessed thereof within the time required by law; and the occupation of such property by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that such property has been held and possessed adversely to such legal title for seven years before the commencement of such action. Provided, however, that if in any action any party shall establish prima facie evidence that he is the owner of any real property under a tax title held by him and his predecessors for four years prior to the commencement of such action and one year after the effective date of this amendment he shall be presumed to be the owner of such property by adverse possession unless it appears that the owner of the legal title or his predecssor has actually occupied or been in possession of such property under such title or that such tax title owner and his predecessors have failed to pay all the taxes levied or assessed upon such property within such four year period."

> "78-12-12.1. Possession and payment of taxes - Proviso - Tax title. - In no case shall adverse possession be established under the provisions of this Code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party, his

> predecessors and grantors have paid all the taxes which have been levied and assessed upon such land according to law. Provided, however, that payment by the holder of a tax title to real property or his predecessors, of all the taxes levied and assessed upon such real property after the delinquent tax sale or transfer under which he claims for a period of not less than four years and for not less than one year after the effective date of this amendment, shall be sufficient to satisfy the requirements of this section in regard to the payment of taxes necessary to establish adverse possession."

The section dealing with the definition of terms is 78-12-5.3 of said Pocket Part and defines "action" as follows:

> "* * * the word 'action' as used in this section includes counterclaims and cross-complaints, and all civil actions wherein affirmative relief is sought."

The term "action" would therefore clearly include these proceedings, however they are designated.

In *Hansen* v. *Morris, supra,* this Court considered said Sections 78-12-5.1 and 78-12-5.3, sustained the constitutionality of the Act and held that where the tax title holder sought to quiet title, he was obligated as part of his case to plead and prove possession and payment of taxes for four years prior to the commencement of the action.

The same sections were under consideration in *Peterson* v. *Callister, supra.* There, however, the deed to the

county was incomplete and lacked certain formalities required by law. The Court answered these contentions with the observation that it was not necessary that title pass to protect the tax title claimant, particularly in view of the fact that defendant had notice of plaintiff's occupancy of the property.

In *Lyman* v. *National Mortgage Bond Corporation, supra,* while the plaintiff proved possession for four years, he failed to prove *payment* of taxes for the four-year period. Plaintiff showed *redemption* of taxes for the four-year period but the Court held on the authority of *Bowen v. Olsen,* 2 Utah 2d 12, 268 P. 2d 983, that the statute required payment and not redemption. Therefore the Court held that plaintiff failed to make out a case. There is nothing in the *Lyman* case which helps the plaintiffs here, for there is no dispute to the fact that defendants Bountiful Livestock Company, Salt Lake Pipeline Company and Salt Lake Refining Company have been in possession of the property since 1943 and paid all taxes thereon since 1944.

Turning to the case at bar, it is seen that plaintiffs as prior owners of the property are completely barred from prosecuting this action under said Section 78-12-5.1 and 78-12-5.2 unless they were in possession of the property within four years prior to the commencement of suit. The plaintiffs do not allege possession or payment of taxes within the four-year period prior to the commencement of the action. On the contrary, the complaints of the plaintiffs affirmatively allege that the defendant Bountiful Livestock Company took possession of and

has ever since said purported sale had the use and benefit and occupation of said land. (R. 2, 47) It is submitted that such allegations and proof are essential under the provisions of the foreging statutes of limitation and are a part of plaintiffs' case and in the absence of such allegations and in the face of the admitted fact to the contrary, these plaintiffs cannot recover.

Plaintiffs assert that the tax sale proceedings are fatally defective within the rule announced in *Telonis* v. *Staley,* 104 Utah 557, 144 P. 2d 513. It is admitted that the County Auditor failed to attach the affidavit to the assessment rolls. This, however, is immaterial to this case. The doctrine of *Telonis v. Staley* and other cases along the same line is now all water under the judicial bridge. The same argument was urged in *Hansen* v. *Morris* and *Peterson* v. *Callister, supra,* and brushed aside by the Court upon the ground that it is now immaterial that defects arose in the tax proceedings. It is further immaterial that title may never have actually passed from the plaintiffs.

(c) In Any Event, the Deed from Davis County to Bountiful Livestock Company is a Written Instrument upon which Bountiful Livestock Company an its Successors can found a Defense based upon Adverse Possession.

The rule is now too well established in Utah to admit of any doubt that a tax title deed from a county, although substantially defective, is a written instrument upon which adverse possession may be founded. This proposition was established in *Welner* v. *Stearns*, 40 Utah 185, 120 Pac. 490, and has consistently been followed by this

Court in several decisions. In the *Stearns* case, purchase agreement was made with the county, thereafter followed by deed. The title of the county was substantially defective, however, the Court held that adverse possession against the old owner commenced on the date of the contract and the entry into possession thereunder and the fact that the deed to the county was defective was not material. At page 195 and 196 of the Utah Report, the Court held as follows:

> "In the case at bar, as we have seen, the county claimed title under a tax deed, and hence claimed from a source other than that through which the respondent Borg claims. For the purpose of meeting the presumption that appellant took and remained in possession in subordination of the paper title, it is immaterial that the tax deed was defective, and did not in law convey an indefeasible title. Appellant's possession was just as much adverse to Borg's title, although the deed was defective, as it would have been if the deed had conveyed a perfect title; the only difference being that under a deed which is defective the claimant in possession must obtain the title, if he obtains it at all, by virtue of the statute, while if the deed is good, and conveys an indefeasible title, the title is in him from the time the deed is delivered."

It is of the utmost importance, too, to recognize the further proposition established in the *Stearns* case, namely, that when the period of redemption has expired and a tax deed has issued, the county thereafter holds under a new title and any possession or act of dominion taken by the county under such new title is adverse to the original owner. Consequently, when the new title arises,

and the county undertakes to deal with the property, adverse possession commences to run against the old owner. This proposition is further demonstrated and affirmed in *Bozievich* v. *Slechta,* 109 Utah 373, 166 P. 2d 239, hereinafter considered.

Welner v. *Stearns, supra,* was followed by *Baker* v. *Goodman,* 57 Utah 349, 194 Pac. 117. In the Goodman case a parcel of land was sold to Goodman by the county under a deed which was asserted to be a mere nullity and in answering this contention this Court at page 355 of the Utah Report said:

> "The tax deed in question, even though it be held to be defective, was sufficient to give color of title. This is the well-established law of this state. *Welner v. Stearns,* 40 Utah 185, 120 Pac. 490, Ann. Cas. 1914C, 1175."

In the *Slechta* case, *supra,* the facts were that the county leased the property to a tenant and thereafter sold the property to a purchaser. The purchaser had not been in possession and paid taxes for the seven years statutory period but if the period during which the tenant was in possession was added, the seven-year requirement was complied with. The question was then whether the adverse possession commenced when the tenant was placed in possession by the county. It was the appellant's contention that because of admitted defects in the tax sale and May sale, the possession which the county took of the property through its tenant was in subordination and not adverse to the right of the old owner and that therefore there had not been adverse possession of the property for a period of more than seven years before

the commencement of the action. This Court at page 378 of the Utah Report meets the contention of the old owner as follows:

> "This case, therefore, rather than being an aid to appellant's contention that the actual physical possession which the county took of the property through its tenants was in subordination to the rights of the record owner, is more pursuasive for the proposition that the county took possession by virtue of its purported ownership of the land. Issuance of an auditor's tax deed did not give the county possession. It was the act of placing tenants in actual possession which initiated possession by the county. The fact that the auditor's deed was invalid and the further fact that because of the invalidity of the May sale a further period of redemption was vouchsafed to the record owner does not change the character and nature of the possession asserted through tenants from being one under a claim of ownership. At the time when the county took possession of the property it did so claiming that it had a valid title, there having been an attempt to comply with all the provisions relating to tax sales. The fact that there were defects in the proceedings did not change the nature of the county's claim. It was open, hostile and adverse to the record owner's right. See *Welner* v. *Stearns et al.*, 40 Utah 185 120 P. 490, Ann. Cas. 1914C, 1175."

Two rules of law are established by this series of cases, namely, (i) a tax deed from a county, however defective, is an instrument in writing sufficient under the adverse possession statutes, and (ii) when the county receives a tax deed to property, however defective, this becomes a source of a new claim of title and when the

county, acting on the basis of this new claim, undertakes to deal with the property and assert dominion over the same, its act in so doing starts the period running for adverse possession against the old owner.

Applying the second proposition to this case, it is clear that when Davis County entered into the contract of sale covering the premises in question, it did so under its claim of title and its act of placing the purchaser in possession under the contract was open, hostile and adverse to the old owner's rights and the period of adverse possession then commenced to run against the old owners.

Turning to our statutes relating to adverse possession, it is seen from Section 78-12-8 and 78-12-9, Utah Code Annotated, 1953, that where one founds a claim upon a written instrument it must be an instrument as a conveyance of the property in question or upon a decree or judgment of a court. Accordingly, where one holds under a deed which purports to pass title but does not do so, he holds under color of title under Utah law. This is in accordance with the weight of authority in the United States. The rule is stated in 1 Am. Jur., Sections 196 and 197, as follows:

> "It has been stated heretofore that 'color of title' is title in appearance only; it is not title in fact. Generally speaking, any instrument, however defective or imperfect, and no matter from what cause invalid, purporting to convey the land, and showing the extent of the tenant's claim, may be color of title; a claim to the land thereunder will draw to the claimant the protection of the

Statute of Limitations if the other requisites of adverse possession are present."

"The very act of claiming title by virtue of an adverse possession for the statutory period precludes the idea of a valid paper title, as do the words 'color of title.' It is evident, therefore, that the requirements as to color of title are sufficiently complied with by a possession held under an instrument which, as a conveyance, is in fact either voidable or void."

Nor is it necessary under Utah law that the holder under the instrument act in good faith. In this case, there is no evidence that Bountiful Livestock Company did not act in good faith and any assertion to the contrary is without merit. However, good faith is not a requisite element in order to initiate and establish a new title by adverse possession under Utah law. Open, continuous adverse possession for the statutory period is all that is required. See "The Adverse Possession of Land Titles in Utah," Volume 3, Number 3, Page 294, Utah Law Review, where Professor Montgomery states the rule to be that:

"The second principal element of an adverse possession is the formulation of the proper mental attitude. This is not to suggest, however, that the claimant must act in good faith for, while it may be a somewhat shocking concept that one can by the combined use of force, fraud, and deceit acquire title to the land of another by adverse possession, in the absence of a statutory provision to the contrary, good faith is entirely unnecessary."

The rule which prevails in Utah as established by many cases is that possession must be open, notorious, continuous, exclusive and adverse. See *Cooper* v. *Carter Oil Company,* 7 Utah 2d 9, 316 P. 2d 320, and *Bozievich* v. *Slechta, supra.* Nothing more is required. By advancing the foregoing propositions, we do not admit that a deed from the County to Bountiful Livestock Company failed to pass title to the grantee. If it should be so determined, it was, however, clearly sufficient to constitute color of title under our adverse possession statute.

(d) Plaintiffs are now Barred by the General Adverse Possession Statutes.

Defendants have pleaded the adverse possession statutes in defense. Adverse possession may be used by a defendant either as a shield or a sword. In other words, defendants may assert adverse possession to defeat the claim of the plaintiff or affirmatively to quiet their own title. See 1 Am. Jur., Adverse Possession, Sections 15 and 16. Defendants have elected to employ the defense as a shield. Although defendants have pleaded these statutes as a defense, they did not need to do so. The defense is available simply under a denial of plaintiffs' title. See 1 Am. Jur., Adverse Possession, Section 235.

Prior to the 1951 Amendment, a period of seven years was required for adverse possession. However, under the foregoing Sections 78-12-7.1, and 78-12-12.1, this has been shortened to four years, where claim is made under a tax title. In this case, Bountiful Livestock Company prior to its deed to the pipeline company had held

for much more than the seven-year period. So it becomes immaterial which period is applied.

It is admitted here that taxes have been continually paid since 1944 and that these defendants have been in adverse possession since 1943. The plaintiffs affirmatively allege such possession as hereinabove set forth and seek to recover the value of the use and occupation of the land. The sufficiency of the adverse possession of Bountiful Livestock Company is admitted and it is well within the rule announced by this Court in *Cooper v. Carter Oil Company, supra.*

(e) The Bar which Prevents Plaintiffs from Recovery against Bountiful Livestock Company, Salt Lake Pipeline Company and Salt Lake Refining Company Likewise Bars the Plaintiffs from any Recovery against Davis County.

The plaintiffs assert that the judgment entered by the Court in this case precludes them from the exercise of a right which they assert to recover the property against Davis County. The contention of the plaintiffs appears to be grounded upon the assumption that if plaintiffs cannot recover the property in a direct attack upon the transaction between Davis County and Bountiful Livestock Company they should nevertheless be entitled to recover the property indirectly in the event that Davis County succeeds under its cross-complaint against the defendant livestock company and its grantees.

For the purpose of testing the merit of such contention, and without admitting any rights of Davis County

to recover under its cross-complaint, let it be assumed that Davis County succeeds under its cross-complaint and recovers the property against Bountiful Livestock Company and its grantees, can the plaintiffs in any event then recover the premises from Davis County? It is submitted the plaintiffs could not so recover, for the following reasons.

Under the doctrine announced in the *Slechta* case, *supra,* when Davis County undertook to deal with the property as its own, placing the livestock company in possession under the contract, and most assuredly when it deeded the property to Bountiful Livestock Company, the statute of limitations began to run against the old owners and now precludes them from recovery. As against these plaintiffs this limitation runs in favor not only of the livestock company and its grantee, but also in favor of Davis County. Moreover, if the deed from Davis County to the livestock company failed to pass title to the latter or if Davis County may for any reason be able to set that deed aside still plaintiffs are barred from recovery under the rule announced in *Slechta, supra.* For under that rule the act of the County in placing a tenant in possession starts the statute running against the old owner. If the County were able to set aside its deed to the livestock company and recover back the property the livestock company and its grantees would nevertheless during all their period of occupancy be tenants at will of the County. Many decisions support this proposition. In *Tate v. Gaines* (Okla.) 105 Pac. 193, the Court states the rule as follows:

> "It has been uniformly held that possession under an invalid conveyance or contract of sale creates a tenancy at will, and where a tenant goes into possession under an invalid lease his tenancy at its inception is merely a tenancy at will. . . . So, while the conveyance was wholly void and of no effect in itself, the possession of the grantee amounted to a tenancy at will, not made so by the void conveyance, but because out of the effort to deal came a permission to enter the land relieving grantee of the imputation of and liability for trespass."

To the same effect see: *Hall v. Wallace* (Cal.) 26 Pac. 360; *Packard v. Railroad Co.* (Ill.) 46 Ill. App. 244; *Lehman* v. *Noltirig* (Mo.) 56 Mo. App. 549; *Howard v. Merriam* (Mass.) 5 Cush 583; *McIntosh* v. *Lee* (Iowa) 10 N.W. 895; *Peters v. Holder* (Okla.) 136 Pac. 400.

It is asserted by the plaintiffs that should the deed from Davis County to Bountiful Livestock Company be for any reason set aside and should Davis County recover back the property, it would then be holding the premises in trust for the plaintiffs. Such a contention is manifestly without merit, for under the rule announced in *Slechta, supra,* the assertion of title by the County when it places the buyer in possession is adverse to the claim of the old owner and sweeps away any vestige of trust relationship.

CONCLUSION

The judgment of the trial court dismissing the suit of these plaintiffs against all defendants must be affirmed for the reasons that: (i) The deed from Davis County

to the livestock company is valid, (ii) Even though invalid, the deed is voidable and not void, (iii) If voidable, the right to avoid the deed belongs to the County and not to the livestock company, (iv) In any event the statutes of limitations and of adverse possession applicable in this case and the decisions of the Courts construing the same preclude these plaintiffs from any recovery.

Respectfully submitted,

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